(2)

No. 91-897

In The

Supreme Court of the United States

October Term, 1991

CHRISTOPHER L. RHODES,

Petitioner,

vs.

LUMMUS INDUSTRIES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD A. KENT
(Counsel of Record)
BRIAN R. BURT
RICK N. BRYSON
TEILBORG, SANDERS & PARKS
3030 North Third Street
Phoenix, Arizona 85012
Telephone: (602) 230-5710
Counsel for Respondent
Lummus Industries

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Did the Ninth Circuit err in striking portions of Petitioner's Opening Brief based on the failure of his Notice of Appeal to comply with Rule 3(c)'s "order designation" requirement?

LIST OF PARTIES

The parties to the proceedings below were, and the parties to this proceeding are:

PETITIONER:

Christopher RHODES, Plaintiff and Appellant below.

RESPONDENT:

LUMMUS INDUSTRIES, INC., Defendant and Appellee below.

PARTY BELOW WHO IS NOT A PARTY TO THIS PROCEEDING:

Continental Conveyor & Equipment Co., Defendant in the trial court who settled with Petitioner.

The parent companies and non-wholly owned subsidiaries of Lummus Industries are:

Anderson & Bigham, Inc.
Westex
Sun Advertising Agency, Inc.
Lummus Development Corp. (LDC)
Eli Whitney of Texas, Inc.
Microsonics, Inc.
Lummus Agricultural Services Corp.
Francais Trading Corp.
Lummus Holdings Corp.
The Lummus Group, Inc.
Response Marketing, Inc.
St. Jude Polymer Corp.
Lummus-Hubei Joint Venture

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONS AND STATUTES 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 9

I. Summary of Argument 9

II. The Petition is Without Jurisdiction Because Petitioner Failed to Make the Showing of "Imperative Public Importance" Required by Rule 11 10

III. There is No Conflict as to Whether the "Order Designation" Requirement of Rule 3(c) is Jurisdictional 12

IV. This Court Should Deny Review Because the Ninth Circuit's Order Striking Portions of Petitioner's Opening Brief was Correct 16

V. Certiorari is Not Appropriate Because the Ninth Circuit's Order was a Fact-Specific Determination Limited to Its Facts 20

VI. If Anything, the Ninth Circuit Exceeded its Jurisdiction in Permitting Petitioner to Challenge Orders Clearly Outside the Scope of His Notice of Appeal 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Coleman v. PACCAR, Inc., 424 U.S. 1301, 1304, n. * (1976) 11

Foman v. Davis, 371 U.S. 178 (1962) 9, 10, 14, 16, 17, 18, 19

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990)..... 15

N.A.A.C.P. v. City of Evergreen, Alabama, 693 F.2d 1367 (11th Cir. 1982), *rehearing denied*, 698 F.2d 1238 (11th Cir. 1983)..... 15

Pope v. MCI Telecommunications Corp., 937 F.2d 258, 266-67 (5th Cir. 1991)..... 15, 19, 22

Roberts v. College of the Desert, 870 F.2d 1411 (9th Cir. 1988) 15

Smith v. Barry, 1992 WL 2909 (U.S. January 14, 1992)..... *passim*

Smith v. Galley, 919 F.2d 893 (4th Cir. 1990), *overruled by Smith v. Barry*, 1992 WL 2909 (U.S. January 14, 1982) 14

State Trading Corp. of India, Ltd. v. Assurance-foreningen Skuld, 921 F.2d 409 (2nd Cir. 1990) .15, 20

Torres v. Oakland Scavenger Company, 487 U.S. 312 (1988) ..... *passim*

Turnbull v. United States, 929 F.2d 173 (5th Cir. 1991)..... 16, 21, 22

Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510 (6th Cir. 1991)..... 15, 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS AND STATUTES

Rule 3(c), F.R.A.P. ..... *passim*

Rule 4(a)(1), F.R.A.P. 2, 23

Rule 26(b), F.R.A.P. 2, 23

United States Supreme Court Rule 11 ..... 1, 2, 10, 11

United States Supreme Court Rule 15.4 10

United States Supreme Court Rule 24.1(e) 10

28 U.S.C. § 2101(e) 3, 11

28 U.S.C. § 1254 ..... 3, 11

Ninth Circuit Rule 28-1 3

A.R.S. § 12-551 ..... 5, 18, 24

OPINIONS BELOW

None of the opinions or judgments below has been published. The August 1, 1991 Ninth Circuit order granting in part and denying in part Lummus' Motion to Strike Petitioner's Opening Brief, the August 29, 1991 Ninth Circuit order denying Petitioner's Motion to Reconsider the August 1, 1991 order and the District Court's June 28, 1990 order are reproduced, respectively, as Appendices B, C and A.

JURISDICTION

As more fully set forth in the Argument section of this Brief, the Petition for Writ of Certiorari lacks jurisdiction because the Court of Appeals has not rendered judgment and Petitioner has failed to make the showing of "imperative public importance . . . as to require immediate settlement" required by Supreme Court Rule 11.

CONSTITUTIONS AND STATUTES

No part of the United States Constitution is implicated in this proceeding. The following rules of procedure and statutes are relevant here.

Federal Rule of Civil Appellate Procedure 3(c) provides:

> **Content of the Notice of Appeal.** The Notice of Appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name

> the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of Notice of Appeal. An appeal shall not be dismissed for informality of form or title of the Notice of Appeal.

Federal Rule of Appellate Procedure 4(a)(1) provides in relevant part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

Federal Rule of Appellate Procedure 26(b) provides in relevant part:

> **Enlargement of Time**. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

United States Supreme Court Rule 11 provides:

> **CERTIORARI TO A UNITED STATES COURT OF APPEALS BEFORE JUDGMENT**
>
> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to

require immediate settlement in this Court. 28 U.S.C. § 2101(e).

28 U.S.C. § 2101(e) provides:

> An application to the Supreme Court for a Writ of Certiorari to review a case before judgment has been rendered in the Court of Appeals may be made at any time before judgment.

28 U.S.C. § 1254 provides in pertinent part:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Ninth Circuit Rule 28-1 provides:

> Briefs not complying with F.R.A.P. and these rules may be stricken by the Court.

STATEMENT OF THE CASE

Petitioner Chris Rhodes ("Petitioner") seeks review of the Ninth Circuit's order striking three of the six arguments in his original Opening Brief based on the failure of his Notice of Appeal to comply with Rule 3(c), F.R.A.P.

Petitioner brought this action against various defendants, including Respondent Lummus Industries ("Lummus"), for injuries sustained to Petitioner's hand while operating a cotton gin. R. 1, 12. Petitioner alleged

Lummus was liable based on alter ego and successor liability theories, even though Lummus did not manufacture, sell or maintain the cotton gin, and even though the same district court in a related action involving the same gin, the same plaintiff's counsel and Lummus had held that Lummus was not the alter ego or successor of the manufacturer. R. 12, 46, 45, at Exhibit A, R. 37, Exhibit A, R. 38, paragraph 5, R. 47, at 2, R. 48, paragraph 3.

The district court here rejected Petitioner's various claims against Lummus in three separate rulings. First, the court granted Lummus' Motion for Partial Summary Judgment as to Petitioner's theories of successor liability, with instructions that Petitioner could proceed to trial with his remaining claim that Lummus was liable under an "independent duty to warn" negligence or strict tort liability theory which Arizona has not recognized. R. 101, 117, R. 124, 248, at 1-2. Second, during trial the district court granted in part Lummus' Motion for Directed Verdict and held that Arizona Revised Statutes (A.R.S.) § 12-551, Arizona's twelve-year product liability statute of repose, barred Petitioner's strict liability theory. R. 180, 248, at 2; June 12, 1989 transcript, at 34-40, 50-52; June 14, 1989 transcript, at 22. The case thus proceeded to the jury based only on Petitioner's negligent independent duty to warn theory. Third, after the jury returned a verdict in favor of Petitioner and found Lummus to be 10% at fault, the district court granted Lummus' Motion for Judgment NOV and, conditionally, new trial as to the verdict based on negligent independent duty to warn. R. 164, 202, 248.

Subsequent to the granting of the JNOV, Petitioner filed several miscellaneous post-trial motions. On May 17, 1990, Petitioner moved the district court to reconsider

the JNOV as to the alleged independent duty to warn theory in light of a recent Arizona case. R. 251, 253. Lummus opposed Petitioner's Motion to Reconsider because Lummus had already provided the case to the court and because the case supported Lummus' position. R. 253. Petitioner also moved to extend the time for filing his Notice of Appeal to July 20, 1990 and further requested that the district court rule it had considered the constitutionality of the product liability statute of repose during trial. R. 255, 256, 263. Petitioner now admits he did not challenge the constitutionality of the statute at trial. Petitioner's revised Opening Brief, at 15. Petitioner also filed a Motion to Certify three issues to the Arizona Supreme Court: 1) successor liability, 2) independent duty to warn, and 3) the constitutionality of the Arizona product liability statute of repose. R. 254.

By order signed June 20, 1990 and entered June 28, 1990, the district court denied Petitioner's Motion to Reconsider the granting of the JNOV as to the independent duty to warn. (App. A). The court explained it had considered the recent Arizona case prior to granting the JNOV and that the case supported Lummus', not Petitioner's, position. (App. A). The June 28 Order also extended the time to appeal to July 20, 1990 and denied Petitioner's Petition for Certification and motion requesting the court to rule it had considered during trial the constitutionality of A.R.S. § 12-551. (App. A).

On July 16, 1990, Petitioner filed his Notice of Appeal. R. 268. The Notice stated, in its entirety:

> NOTICE IS HEREBY GIVEN that Plaintiff, CHRISTOPHER L. RHODES, appeals to the United States Court of Appeals for the Ninth

> Circuit, from the Order entered in this action on the 20th day of June, 1990; that Order extended Rhodes' time for filing a Notice of Appeal until July 20, 1990.

R. 268.

While there is no order in this case "entered" on June 20, 1990, the order to which Petitioner's Notice of Appeal apparently referred was the order signed on June 20 and entered on June 28, 1990. As stated above, that Order denied Petitioner's motions to reconsider the JNOV as to independent duty to warn, to certify questions to the Arizona courts and to rule that Petitioner had raised during trial, and the court had considered, the constitutionality of A.R.S. section 12-551. R. 265. Petitioner's Notice of Appeal did not list the Partial Summary Judgment as to successor liability, the Partial Directed Verdict as to the applicability of the statute of repose, the Judgment, Amended Judgment, or the JNOV or conditional New Trial Order. R. 268. Moreover, the only basis for the May 17, 1990 Motion to Reconsider the partial JNOV as to independent duty to warn which the June 28, 1990 Order denied was that the court should reconsider the JNOV in light of the recent case which the court had considered in granting the JNOV. R. 265, 251.

On April 29, 1991, Petitioner mailed his original Opening Brief. Petitioner's Opening Brief challenged numerous rulings not listed in his Notice of Appeal. The issues addressed in Petitioner's original Opening Brief were:

> 1) Whether Arizona would recognize an independent duty to warn in a products liability case;

2) Whether the District Court erred in granting summary judgment to Appellee on the issues of successor liability;

3) Whether there were sufficient facts adduced at trial to support a finding of proximate cause;

4) Whether the District Court erred in finding on its own motion that the nature of the danger was open and obvious;

5) Whether the verdict was excessive or the product of passion or prejudice; and

6) Whether Arizona's product liability Statute of Repose, A.R.S. § 12-551, was unconstitutional.

On May 29, 1991, Lummus filed a Motion to Strike Petitioner's Opening Brief or, Alternatively, Motion for Summary Affirmance. The grounds for the Motion were that the Brief exceeded the scope of Petitioner's Notice of Appeal and that there was appellate jurisdiction only as to the matters adjudicated by the June 28, 1990 Order from which Petitioner appealed. Lummus also argued for summary affirmance as to the constitutionality of the Arizona product liability statute of repose because 1) Petitioner admittedly had not raised the issue below, *see* Petitioner's Revised Opening Brief, dated August 29, 1991, at 15, and 2) recent Arizona Supreme Court and Federal District Court decisions rejected identical constitutional challenges brought by Petitioner's counsel in several other cases, one of which involved Lummus and the same cotton gin involved here.

On August 1, 1991, in an unpublished Order, the Ninth Circuit granted in part and denied in part Lummus' Motion to Strike. (App. B). The Court struck Petitioner's Brief, but permitted him to submit a revised

opening brief addressing three issues referenced in footnotes 1, 2, and 3 of the District Court's June 28, 1990 Order. *Id.* These three issues are essentially issues 1, 2 and 6 from Petitioner's original Opening Brief – independent duty to warn, successor liability and the constitutionality of A.R.S. section 12-551.

The June 28, 1990 Order from which Petitioner appealed did not adjudicate the three issues stated in its footnotes, but rather merely referenced them in denying Petitioner's Motion to Certify as the issues which Petitioner sought to certify. (App. A). The issue in footnote 1 of the June 28, 1990 Order as to independent duty to warn was adjudicated by the grant of JNOV. R. 248. The issue in footnote 2 as to the constitutionality of section 12-551 was never adjudicated because Petitioner never raised it. *See* Petitioner's Revised Opening Brief, dated August 29, 1991, at 15. The issue in footnote 3 as to successor liability was addressed by the grant of partial summary judgment. R. 101, 117, 124.

On August 9, 1991, Lummus filed a Motion to Reconsider that portion of the Ninth Circuit's August 1, 1991 order permitting Petitioner to argue the three issues stated in the footnotes of the June 28, 1990 Order. The basis for the Motion was that the summary judgment, partial directed verdict and JNOV rulings which adjudicated the above three issues were not listed in, and were outside the fair scope of, Petitioner's Notice of Appeal, contrary to Rule 3(c), F.R.A.P. Petitioner also filed a Motion to Reconsider the Ninth Circuit's Order striking in part his Opening Brief. The Ninth Circuit denied both Motions in separate Orders dated August 29, 1991. (App. C and D). On August 29, 1991, Petitioner filed a Revised

Opening Brief as to issues 1, 2 and 6 stated above. On November 26, 1991 Petitioner mailed his Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

This Court should deny review for several reasons.

First, Petitioner has failed to make the showing of "imperative public importance" required by Supreme Court Rule 11 for petitions filed before the court of appeals renders judgment. The Petition should thus be denied for this reason alone.

Second, the Ninth Circuit did not hold that *Torres* overruled *Foman*, nor is there a circuit conflict as to whether Rule 3(c), F.R.A.P., is jurisdictional. This Court in *Torres* expressly addressed *Foman* and enunciated the proper rule as to whether a particular notice of appeal vests the appellate court with jurisdiction: Rule 3(c) is jurisdictional, and while a notice of appeal may be liberally construed, it must provide the "functional equivalent" of the information the Rule requires. Moreover, this Court has just recently reaffirmed the *Torres* holding in *Smith*. There is thus no need to again restate the rule governing Rules 3 and 4, nor is there any conflict in the circuits.

Third, the Ninth Circuit's holding is limited in scope because it involves the application of the principles established in *Torres*, *Foman* and *Smith v. Barry* to a specific set of facts. What the existing circuit cases show is that application of these principles to a particular notice of

appeal is fact intensive and requires the exercise of considerable judgment by the courts of appeals as to whether the information required by Rule 3 has been fairly provided. Absent plain error, which is not present here, this Court need not review the literally dozens of cases which annually apply Rule 3's standard.

Finally, the Ninth Circuit properly applied the above principles to Petitioner's Notice of Appeal and in striking portions of his Opening Brief. Indeed, if anything, the Ninth Circuit was overly lenient in permitting Petitioner to challenge on appeal rulings not within the scope of his Notice of Appeal. This Court would thus be justified in holding there is no appellate jurisdiction as to any of the arguments in Petitioner's Revised Opening Brief. The Ninth Circuit's ruling thus treated Petitioner more than fairly and is entirely consistent with *Torres*, *Foman* and *Smith*. There is thus no reason for this Court to accept review.

This Court should thus deny Rhodes' Petition for a Writ of Certiorari.

II. THE PETITION IS WITHOUT JURISDICTION BECAUSE PETITIONER FAILED TO MAKE THE SHOWING OF "IMPERATIVE PUBLIC IMPORTANCE" REQUIRED BY RULE 11.

The Petition for Writ of Certiorari lacks jurisdiction because the Court of Appeals has not rendered judgment and Petitioner has failed to make the showing of "imperative public importance" required by Supreme Court Rule 11. Pursuant to Supreme Court Rules 15.4 and 24.1(e), the Petition for Writ of Certiorari is without jurisdiction and should be denied for this reason alone.

Petitioner correctly notes that 28 U.S.C. §§ 1254(1) and 2101(e) permit a Petition for Writ of Certiorari "before judgment" by the Court of Appeals. Yet Supreme Court Rule 11 imposes an additional requirement on such extraordinary petitions:

> **CERTIORARI TO A UNITED STATES COURT OF APPEALS BEFORE JUDGMENT**
>
> A Petition for a Writ of Certiorari to review a case pending in the United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this court.

Thus, while certiorari may be sought in extraordinary cases before the Court of Appeals renders judgment, the Petitioner must make a showing of imperative public importance justifying deviation from the general rule prohibiting prejudgment petitions. As stated by this Court, a grant of certiorari before judgment by the Court of Appeals is an "extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304, n. * (1976).

Petitioner has not, and cannot, make the showing required by Rule 11. This case does not involve a national emergency or other pressing issue requiring immediate resolution by this Court. Indeed, as recently as January 14, 1992, this Court reiterated the rules governing whether a notice of appeal satisfies Rule 3(c)'s requirements. *See Smith v. Barry*, 1992 WL 2909 (U.S. January 14, 1992). Extraordinary immediate review is thus not necessary. Indeed, Petitioner has not even *attempted* to make the requisite Rule 11 showing. Neither the jurisdictional

statement nor the argument section of his Petition sets forth any "imperative public importance."

Because Petitioner has not satisfied Supreme Court Rule 11, his Petition should be summarily denied.

III. THERE IS NO CONFLICT AS TO WHETHER THE "ORDER DESIGNATION" REQUIREMENT OF RULE 3(C) IS JURISDICTIONAL.

Petitioner attempts to create a conflict where none exists. Contrary to Petitioner's claim, *Torres*, the Advisory Committee Note to Rules 3 and 4, F.R.A.P., and this Court's recent decision in *Smith v. Barry* expressly recognize that Rule 3(c)'s requirements are jurisdictional and mandatory.

Of all pleadings in the trial and appellate courts, the notice of appeal is perhaps the simplest. Rule 3(c), F.R.A.P., requires that a notice of appeal specify only three things: 1) "the party or parties taking the appeal," 2) "the judgment, order or part thereof appealed from," and 3) "the court to which the appeal is taken."

This Court has repeatedly, and recently, held that Rule 3(c) is jurisdictional and that a notice of appeal which does not comply with the Rule does not create appellate jurisdiction as to the information not provided. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Smith v. Barry*, 1992 WL 2909 (U.S. January 14, 1992).

In *Torres* this Court, in an 8 to 1 decision, held that "failure to file a notice of appeal in accordance with the specificity requirements of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal." 487 U.S. at 314. In reaching this conclusion, the *Torres* Court relied on the Advisory Committee Note to Rule 3,

which provides that "because the timely filing of a Notice of Appeal is 'mandatory and jurisdictional,' . . . compliance with the provisions of [Rules 3 and 4] is of the utmost importance." The Court stated its reasoning as follows:

> The failure to name a party in a Notice of Appeal is more than excusable "informality"; it constitutes a failure of that party to appeal.
>
> . . . Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

487 U.S. 314-15.

While *Torres* involved a failure to specify the party taking the appeal, rather than the order appealed from, the Court also observed that the Advisory Committee Note "makes no distinction among the various requirements of Rule 3 and 4; rather it treats the requirements of the two rules as a single jurisdictional threshold." 487 U.S. at 315. *Torres* thus did not limit its holding to Rule 3(c)'s "party designation" requirement, but applied it to Rule 3(c) generally. 415 U.S. at 315-18. Indeed, specifying the order appealed from may be even more jurisdictionally essential than listing the parties appealing. The number of parties appealing will not, in most cases, change the issues or arguments on appeal. The order appealed from, however, defines the very scope of the appeal and what is at issue.

Torres also rejected Petitioner's argument based on *Foman v. Davis*, 371 U.S. 178 (1962) that Rule 3(c)'s party designation requirement is jurisdictional, but its order designation requirement is not. As stated by the *Torres* Court, "*Foman* did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature; rather, the Court simply concluded that in light of all the circumstances, the Rule had been complied with." *Torres*, 487 U.S. at 316. *Torres* thus did not overrule *Foman*, but clarified that Rule 3(c) is jurisdictional. *Id.* To the extent there was any question after *Foman* that Rule 3(c) is a jurisdictional prerequisite, it has been eliminated by this Court's more recent decision in *Torres*.

In addition, on January 14, 1992, this Court overruled one of the cases Petitioner incorrectly claims supports his argument that Rule 3(c)'s "order designation" requirement is not jurisdictional. *See Smith v. Barry*, 1992 WL 2909 (U.S. January 14, 1992), *overruling Smith v. Galley*, 919 F.2d 893 (4th Circuit 1990), cited in Petition for Writ of Certiorari, at 9. In *Smith*, this Court reaffirmed the *Torres* holding that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." 1992 WL 2909, at 3. Smith, an inmate, filed a *pro se* premature notice of appeal. After the pending post-trial motion was adjudicated, Smith filed a brief within the deadline for filing a notice of appeal. *Id.* at 1. The Fourth Circuit dismissed Smith's appeal for lack of jurisdiction on the ground that an appellate brief cannot constitute a notice of appeal.

On January 14, 1992, this Court reversed. After noting both the order and party designation requirements of Rule 3(c), the *Smith* Court reaffirmed the *Torres* holding

that Rule 3's are jurisdictional. *Id.* at 3. The *Smith* Court thus held that an appellate brief may constitute a notice of appeal *if* it provides the information required by Rule 3(c). *Id.* at 3-5. *Smith* thus reaffirms that while the *form* of the document constituting the notice of appeal is not important, the *information* Rule 3(c) requires that it provide is a jurisdictional prerequisite.

Thus, Petitioner's claim that "not one [circuit] has held that the failure to specify the judgment appealed from is jurisdictional" is simply wrong. Petition for Writ of Certiorari, at 7. The circuits concur with *Torres* and *Smith*, as they must, that Rule 3(c)'s order designation requirement is jurisdictional. *See, e.g., Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (Rule 3(c)'s order designation requirement is jurisdictional and prevents the Court of Appeals from considering rulings not listed in the notice of appeal); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991) (if an appellant chooses to designate specific orders in the Notice of Appeal, rather than appealing from the entire judgment, only the orders specified may be challenged on appeal); *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 266-67 (5th Cir. 1991); *Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988); *N.A.A.C.P. v. City of Evergreen, Alabama*, 693 F.2d 1367 (11th Cir. 1982), rehearing denied, 698 F.2d 1238 (11th Cir. 1983). Even Petitioner's own cases recognize that Rule 3(c)'s order designation requirement *is* jurisdictional. *See, e.g., State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409 (2nd Cir. 1990) ("combined requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure are to be treated as a single

jurisdictional threshold and may not be waived."); *Turnbull v. United States*, 929 F.2d 173 (5th Cir. 1991)("the court may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' ").

There is thus no conflict in the decisions of the circuits or this Court that failure to comply with Rule 3 is a jurisdictional bar. This Court should thus deny the Petition.

IV. THIS COURT SHOULD DENY REVIEW BECAUSE THE NINTH CIRCUIT'S ORDER STRIKING PORTIONS OF PETITIONER'S OPENING BRIEF WAS CORRECT.

Relying on *Foman v. Davis*, 371 U.S. 178 (U.S. 1962), Petitioner argues that the admitted failure of his Notice of Appeal to comply with Rule 3(c) by identifying rulings he now seeks to challenge is not jurisdictional and does not bar those issues because his intent to appeal from them can be inferred from pleadings other than his Notice and because Lummus is not prejudiced. Petitioner misapplies *Foman* and ignores the holdings of *Torres* and *Smith* discussed above.

In *Foman*, the appellant initially filed a premature notice of appeal from the judgment and subsequently filed a timely notice of appeal from the denial of his post-trial motions. The *Foman* Court recognized the appeal from the judgment because "taking the two notices" together evidenced the appellant's intent to appeal from the judgment. 371 U.S. at 181.

Foman must be read in light of this Court's more recent holdings in *Torres* and *Smith* that compliance with

Rule 3(c) is jurisdictional. First, *Torres* expressly distinguished *Foman* because *Foman* did not address whether Rule 3(c) was jurisdictional, but only whether appellant had complied with its requirements under the facts there. 487 U.S. at 317. Here, Petitioner has admitted his Notice of Appeal was deficient, and that is thus not at issue.

Second, while *Torres* recognized that "substantial compliance" with Rule 3(c) may be sufficient in some instances, the Court also held that the notice of appeal must constitute the "functional equivalent of what the rule requires." 487 U.S. at 315-16, 317. In so holding, *Torres* specifically discussed *Foman* in addressing Rule 3(c)'s requirement that the notice of appeal "designate the judgment or order . . . appealed from":

> Permitting imperfect but substantial compliance with technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold.
>
> . . .
>
> Although a court may construe the rules liberally in determining whether they have been complied with, *it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds that they have not been met.*

487 U.S. at 315-16, 317 (emphasis provided).

Petitioner's Notice of Appeal here does not even come close to "substantially complying" with Rule 3(c) as to the arguments stricken from his original Opening Brief. As set forth in the Statement of the Case above, Petitioner's various theories of liability were disposed of

piecemeal by several trial court rulings – the partial summary judgment as to successor liability, the partial directed verdict as to A.R.S. section 12-551 and the JNOV as to independent duty to warn. Yet the *only* order Petitioner listed in his Notice of Appeal was the June 28, 1990 Order denying his miscellaneous motions to certify questions to the state court, to rule that Petitioner had raised the constitutionality of A.R.S. section 12-551 at trial (when he had not) and to reconsider the partial JNOV ruling in light of a recent case the court had already considered. The June 28, 1990 Order had nothing to do with issues 3, 4 and 5 stricken from Petitioner's original Opening Brief as to proximate cause, open and obvious danger and excessiveness of the verdict. If an appellant chooses to designate specific orders in his Notice of Appeal, rather than appealing from the entire judgment, only the orders specified may be challenged on appeal. *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991). The Ninth Circuit thus did not err in striking issues 3, 4 and 5 from Petitioner's original Opening Brief.

Indeed, Petitioner's Opening Brief did not challenge any of the June 28, 1990 rulings, but addressed only orders not listed in his Notice of Appeal. As discussed later, the Ninth Circuit's order thus was overly lenient in permitting Petitioner's revised Brief to challenge orders clearly outside the scope of his Notice of Appeal.

The third reason *Foman* does not support Petitioner's argument is that the *Foman* Court found that the appellant substantially complied with Rule 3 because "taking the two notices" together evidenced the intent to appeal from the judgment. 371 U.S. at 181. Significantly, the *Foman* Court based its conclusion on the appellant's

express designation of the judgment in the notice of appeal itself. This is important because to require the appellate court and parties to decipher an appellant's intent from vague references in numerous pleadings other than the denominated notice of appeal is unfair, unwise, does not provide adequate notice and violates the plain language of Rules 3 and 4. As recently stated by the Fifth Circuit, "those cases that do construe notices of appeal liberally to find jurisdiction do so where it is clear, *from the face of the notice*, that the appeal intends to raise all issues or other parties." *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 266-67 (5th Cir. 1991)(emphasis provided). Here, Petitioner argues he should be permitted to challenge numerous rulings because his intent to appeal from them is evident from various miscellaneous pleadings *other than his Notice of Appeal*. His reliance on these miscellaneous pleadings is thus inconsistent with both *Foman* and Rules 3 and 4.

Petitioner's Notice of Appeal thus did not "substantially comply" with Rule 3 or constitute the "functional equivalent" of an appeal as to the rulings challenged in his original Brief. As stated by this Court in *Torres*, "we find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed." 487 U.S. at 317. As in *Torres*, Petitioner's Notice of Appeal was insufficient, and there is thus no need for this Court to accept review.

V. CERTIORARI IS NOT APPROPRIATE BECAUSE THE NINTH CIRCUIT'S ORDER WAS A FACT-SPECIFIC DETERMINATION LIMITED TO ITS FACTS.

In support of his argument, Petitioner cites numerous circuit cases finding that there was appellate jurisdiction as to the orders in question. These cases do not, as Petitioner claims, establish that Rule 3(c)'s order designation requirement is not jurisdictional. Rather, they merely apply *Torres* and *Smith*'s standard to facts distinguishable from those here. Indeed, what these cases establish is that whether a particular notice of appeal provides the information required by Rule 3(c) is a fact-specific determination. Similarly here, the Ninth Circuit justifiably held Petitioner's Notice was sufficient as to some orders and insufficient as to others after carefully reviewing the facts before it. Because numerous such cases limited to their facts arise each year, and because this Court has repeatedly and recently set forth the standards governing such cases, review by this Court is not necessary.

Petitioner's circuit cases are easily distinguishable, support the jurisdictional nature of Rule 3 (c)'s order designation requirement and the Ninth Circuit's ruling here and demonstrate the fact-intensive nature of such determinations. For example, in the Second Circuit's decision in *State Trading v. Assuranceforeningen Skuld*, 921 F.2d 409 (2nd Cir. 1990), appellant initially filed a notice of appeal from the judgment. After the first notice was withdrawn, appellant filed a second notice from the denial of its post-trial motion. The Second Circuit first noted that the "combined requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure are to be

treated as a single jurisdictional threshold and may not be waived." 921 F.2d at 412. Applying this standard, the Court permitted the appellant to challenge the judgment because the first notice listed it and because the second notice was titled a "reinstatement" of the original appeal. *Id.*

Similarly, contrary to Petitioner's claim, the Fifth Circuit has also recognized that Rule 3(c)'s "order designation" requirement is jurisdictional. *Turnbull v. United States*, 929 F.2d 173 (5th Cir. 1991) involved the Fifth Circuit's *sua sponte* review of its jurisdiction to determine if it was required to dismiss, not just limit the scope of, the appeal. The *Turnbull* Court held that the appeal from the denial of appellant's motion for new trial which challenged the entire judgment was sufficient to create jurisdiction as to the judgment because appellee conceded it was not prejudiced and had fully briefed appellant's arguments regarding the judgment. *Id.* at 178. That is clearly distinguishable from the facts here.

Moreover, *Turnbull* and the other Fifth Circuit cases cited by Petitioner must be read in light of that Court's most recent pronouncement regarding Rule 3(c):

> [T]he court "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." . . .
>
> Thus, when an appellant "chooses to designate specific determinations in his notice of appeal – rather than simply appealing from the entire judgment – only the specified issues may be raised on appeal."

Pope v. MCI Telecommunications Corp., 937 F.2d 258, 266-67 (5th Cir. September 3, 1991).

Contrary to Petitioner's assertion, the above cases support, not contradict, the Ninth Circuit's order here. Moreover, their consistency with *Torres* and fact-specific nature shows that this Court need not, and cannot, review them all. Lummus submits that the proper role for this Court as to Rule 3(c) issues is to establish general rules to be applied to specific notices of appeal. This Court has already established such general rules in *Torres*, *Foman* and, just recently, *Smith*. While these cases, and the circuit cases, reach different results, that is because the same rules are applied to varying circumstances. The Ninth Circuit properly applied these general rules to the specific facts here, and its unpublished ruling is thus correct and limited in scope. This is thus not the type of case that requires review by this Court.

VI. IF ANYTHING, THE NINTH CIRCUIT EXCEEDED ITS JURISDICTION IN PERMITTING PETITIONER TO CHALLENGE ORDERS CLEARLY OUTSIDE THE SCOPE OF HIS NOTICE OF APPEAL.

Petitioner's final argument that Lummus would not be prejudiced by expanding the scope of the appeal here and that "equity" requires such a result is incorrect for several reasons.

First, as stated by this Court in *Torres*, "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived." 487 U.S. at 317, n. 3. Moreover, in the *Turnbull* case on which Petitioner relies the appellee fully

briefed the issues in question and conceded there was no prejudice. 929 F.2d at 178. Lummus, on the other hand, moved to strike Petitioner's Opening Brief when it raised numerous rulings outside the scope of Petitioner's Notice of Appeal. In any event, Lummus clearly would be prejudiced if Petitioner were permitted to challenge orders not listed in the Notice of Appeal. Petitioner's original Opening Brief challenged *only* orders *not* raised in the notice of appeal and did *not* challenge the *only* order listed in the notice of appeal. To permit Petitioner to challenge such orders clearly prejudices Lummus and, more importantly, exceeds the Court of Appeals' jurisdiction.

Petitioner's "prejudice" argument is also misplaced because it violates the timeliness requirement of Rule 4, F.R.A.P. Petitioner argues that there is appellate jurisdiction as to issues not identified in his Notice of Appeal because he did list them in his Civil Appeals Docketing Statement. Because the timely filing of a Notice of Appeal is a jurisdictional prerequisite, neither an amended notice of appeal nor any other pleading can create appellate jurisdiction after the time to appeal has expired. *See generally* Rule 4, F.R.A.P. As stated by this Court in *Torres*, "Permitting courts to exercise jurisdiction . . . after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal," which is prohibited. 487 U.S at 315.

For example, if an otherwise proper Notice of Appeal which provides the information required by Rule 3(c) is filed one day late, it lacks jurisdiction. Rules 4(a)(1), 26(b), F.R.A.P. *A fortiori*, if an untimely, but otherwise proper, notice of appeal is jurisdictionally deficient, a nonbinding "Civil Appeals Docketing Statement" cannot

possibly create appellate jurisdiction after the appeal time has run. Moreover, because an absence of jurisdiction may not be waived, an appellee's inadvertent failure to point out the inconsistency between the notice of appeal and the Civil Appeals Docketing Statement does not cure the jurisdictional defect.

Indeed, if anything, the Ninth Circuit exceeded its jurisdiction in permitting Petitioner's revised Brief to challenge orders not even remotely within the scope of his notice of appeal. Even if Petitioner's appeal from the June 28, 1990 Order were liberally construed, it clearly did not reach the partial summary judgment as to successor liability, the JNOV as to independent duty to warn and the partial directed verdict as to A.R.S. section 12-551. The only reason the Ninth Circuit permitted Petitioner to address the successor liability, independent duty to warn and A.R.S. section 12-551 constitutionality issues was that they were referenced for informational purposes in the June 28, 1990 order from which Petitioner appealed. (App. A). A notice of appeal from an order which references, as opposed to adjudicates, issues does not create jurisdiction as to them.

Because appellate courts have the responsibility to review their jurisdiction, this Court should hold that the Ninth Circuit lacks jurisdiction to review any of the issues addressed in Petitioner's Brief. This Court should thus both deny the Petition for a Writ of Certiorari and instruct the Ninth Circuit that its jurisdiction extends only to the matters adjudicated by the June 28, 1990 Order from which Petitioner appeals. As stated by the *Torres* Court:

> We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process."

487 U.S. at 318.

CONCLUSION

For Rule 3(c) to have any meaning, there must be a point at which a notice of appeal's failure to list orders means that those rulings may not be challenged on appeal. This is such a case. Even construing Petitioner's Notice liberally, the facts here justified the Ninth Circuit's order striking some of the issues addressed in Petitioner's Brief. Indeed, this Court should instruct the Ninth Circuit that the arguments in Petitioner's Revised Brief also exceed the scope of appellate jurisdiction.

In addition, there is no conflict in the decisions of this Court or the circuits requiring review by this Court. The Ninth Circuit here properly applied the principles set forth in *Torres*, *Foman* and *Smith* to the facts of this case. Moreover, its unpublished order is limited to its facts. Finally, the Petition should be summarily denied because it fails to comply with Supreme Court Rule 11.

This Court should thus deny the Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD A. KENT
(Counsel of Record)
BRIAN R. BURT
RICK N. BRYSON
TEILBORG, SANDERS & PARKS
3030 North Third Street
Telephone: (602) 230-5710
Phoenix, Arizona 85012
Counsel for Respondent

APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff, - vs. CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, LUMMUS INDUSTRIES, INC., a Georgia corporation, Defendants.	Case No. CIV 86-616 TUC RMB [JMF] ORDER (Filed Jun. 28, 1990)

Plaintiff's Motion For Relief Of Judgment; Or, In The Alternative Motion For Reconsideration is DENIED. The certified question answered by the Arizona Supreme Court in *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939 (Ariz. 1990), and the Ninth Circuit's conforming decision, *Torres v. Goodyear Tire & Rubber Co.*, No. 87-2062, slip op. (9th Cir. Apr. 13 1990), were both available to and considered by me before I entered my order of May 2, 1990. Nothing in those decisions mandates legal conclusions different from those I have made regarding the duty to warn based on theories of negligence.

APPENDIX A-2

As to points two[1] and three[2], plaintiffs Petition For Certification Order is DENIED. As for point one[3],

---

[1] Point two being:

> Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins has an independent duty to warn of the prior corporation's defective product?

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

[2] Point three being:

> Whether the twelve year Statute of Repose limitations portion of A.R.S. § 12-551 is unconstitutional under Article 18, Section 6 under the due process/equal protection divisions of the Arizona Constitution when the machine involved in the injury was distributed for use more than twelve years prior to the injury.

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

[3] Point one being:

> Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins may be liable as a successor corporation under strict liability and/or negligence for a defective and unreasonably dangerous product?

Plaintiff's proposed certification order at 1-2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

plaintiff should make his application to Chief Judge Bilby since Judge Bilby made the substantive ruling on the issue of successor liability.

Plaintiff's Renewed Application For Clarification Of The Court's Ruling On The Constitutionality Of A.R.S. § 12-551 is DENIED.

Good cause showing, plaintiff's Motion To Extend Time For Filing Notice Of Appeal is GRANTED. Plaintiff shall have until July 20, 1990, to file his notice of appeal.

IT IS SO ORDERED.

DATED this 20th day of June, 1990, at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 1, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to strike appellant's opening brief is granted. *See* Fed. R. App. P. 3(c). Appellee's alternative motion for summary affirmance is denied.

Within 28 days of the date of this order, appellant shall file a new opening brief. Appellant's brief shall be limited to the issues defined in footnotes 1, 2, and 3 of the district court's June 28, 1990 order. The remainder of the briefing schedule shall be as set forth in Fed. R. App. P. 31(a). Failure to comply with this order may result in dismissal of this appeal pursuant to 9th Cir. R. 42-1.

MoCal 7/30/91.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellant's motion to reconsider is denied. No further motions to reconsider will be entertained.

MoCal 7/30/91 (Mem 8/91)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to reconsider or clarify is denied. Appellee is reminded that the panel that considers this appeal on the merits has the discretion to decide whether certain orders or issues are properly before it. The briefing schedule established in the court's August 1, 1991 order shall remain in effect.

MoCal 7/30/91 (Mem 8/91)